No. 09-1508

JUL 26

In The
Supreme Court of the United States

DAVID CRITZER AND MARGARET CRITZER,

Petitioners,

v.

CITY OF CUPERTINO,

Respondent,

JERRY ENOS, ET AL.,

Real Parties in Interest.

On Petition For A Writ Of Certiorari To The Court Of Appeal, State Of California Sixth Appellate District

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A.K. ABRAHAM*
CHAUVEL, ABRAHAM & DESCALSO, LLP
155 Bovet Road, Suite 780
San Mateo, CA 94402-3155
(650) 573-9500
aka@chauvelabraham.com

**Counsel of Record*

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

I. This Court Has Jurisdiction To Review The Underlying State Court Case As The State Court Judgment Appealed From Was Not Based On Independent Or Adequate State Grounds 2

A. The State Court Judgment Regarding Petitioners' Traditional Mandamus Claim Was Not Based On Independent State Law Grounds 2

B. The State Court Judgment Regarding Petitioners' Administrative Mandamus Claim Was Not Based On Independent State Law Grounds 6

C. The State Court Judgment Regarding Petitioners' Administrative Mandamus Claim Was Not Based On Adequate State Law Grounds 8

II. Certiorari Should Be Granted To Resolve A Conflict Between Multiple Decisions Of This Court And The California State Courts Concerning The Minimum Property Deprivation Required To Implicate The Fourteenth Amendment's Right To Due Process 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

FEDERAL CASES

ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989) 13

Ake v. Oklahoma, 470 U.S. 68 (1985) 3

Barr v. City of Columbia, 378 U.S. 146 (1964) 8

Beard v. Kindler, ___ U.S. ___, 130 S.Ct. 612 (2009) 8

Board of Regents v. Roth, 408 U.S. 564 (1972) 7

Boddie v. Connecticut, 401 U.S. 371 (1971) 7

Coleman v. Thompson, 501 U.S. 722 (1991) 2

Florida v. Powell, ___ U.S. ___, 130 S.Ct. 1195 (2010) 2, 5, 6

Ford v. Georgia, 498 U.S. 411 (1991) 9, 10

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 2

Goss v. Lopez, 419 U.S. 565 (1975) 7

Harris v. Reed, 489 U.S. 255 (1989) 5, 8

Hathorn v. Lovorn, 457 U.S. 255 (1982) 8, 9, 10

Hawaii v. Office of Hawaiian Affairs, ___ U.S. ___, 129 S.Ct. 1436 (2009) 5, 8

Hernandez v. New York, 500 U.S. 352 (1991) 11

Klinger v. Missouri, 80 U.S. 257 (1871) 2

Michigan v. Long, 463 U.S. 1032 (1983) 2, 5, 6

Miller v. Fenton, 474 U.S. 104 (1985) 11

TABLE OF AUTHORITIES Continued

Page

Minnesota v. National Tea Co., 309 U.S. 551 (1940) 13

Murdock v. City of Memphis, 87 U.S. 590 (1875) 3

North Georgia Finishing, Inc. v. Di Chem, Inc., 419 U.S. 601 (1975) 7

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 7

Wright v. Georgia, 373 U.S. 284 (1963) 10

STATE CASES

Associated Builders & Contractors, Inc. v. San Francisco Airports Commission, 21 Cal.4th 352 (1999) 3

County of San Diego v. State of California, 15 Cal.4th 68 (1997) 9

Dexter v. County of San Diego, 203 Cal.App.3d 257 (1988) 9

Environmental Law Fund, Inc. v. Town of Corte Madera, 49 Cal.App.3d 105 (1975) 7

Glendale City Employees' Association, Inc. v. City of Glendale, 15 Cal.3d 328 (1975) 7

Horn v. County of Ventura, 24 Cal.3d 605 (1979) 7

Jonathan Neil & Assoc., Inc. v. Jones, 33 Cal.4th 917 (2004) 9

Vernon Fire Fighters v. City of Vernon, 107 Cal.App.3d 802 (1980) 8, 9, 10

TABLE OF AUTHORITIES – Continued

Page:

UNITED STATES CONSTITUTION

U.S. Constitution, Amendment 14 ..... 10, 12

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In their Petition for Certiorari, David and Margaret Critzer urge this Court to accept review for the purpose of clarifying that real property rights are entitled to the same procedural due process protections under the U.S. Constitution as other types of property. Specifically, petitioners maintain that the California Court of Appeal elevated the minimum threshold for requiring pre-deprivation notice and a hearing far beyond anything contemplated by this Court's precedents, or those of the federal Courts of Appeals, requiring this Court's attention.

The primary contention of respondent City of Cupertino's Brief in Opposition ("ROB") is that the decision below rested upon independent and adequate state grounds, *viz.*, that the state court's conclusions with respect to the availability of traditional or administrative mandamus under state law support the adjudication below without necessarily implicating any issue of federal provenance. However, as explained *infra*, those state law determinations are neither independent of the state court's due process analysis, nor are they adequate to support its ruling in this case.

I. This Court Has Jurisdiction To Review The Underlying State Court Case As The State Court Judgment Appealed From Was Not Based On Independent Or Adequate State Grounds

This Court has long held that it does not have jurisdiction over a state court decision based on independent and adequate state law grounds to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Klinger v. Missouri*, 80 U.S. 257, 263 (1871). In the instant case, however, the state court judgment is neither independent nor adequate, and therefore, this Court has jurisdiction to review the state court decision which this Petition seeks to overturn.

A. The State Court Judgment Regarding Petitioners' Traditional Mandamus Claim Was Not Based On Independent State Law Grounds

While this Court will not assert jurisdiction over a state court judgment that rests on federal and state grounds, and "the non-federal ground is independent of the federal ground and adequate to support the judgment," *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935), where the federal ground is "interwoven" with the state law ground upon which the judgment rests, the state court judgment is not considered independent, and federal jurisdiction attaches. *Florida v. Powell*, __ U.S. ___, 130 S.Ct. 1195, 1211 (2010), citing *Michigan v. Long*, 463 U.S. 1032, 1040-1041

(1983); *Murdock* v. *City of Memphis*, 87 U.S. 590, 635-636 (1875). A state court ground is "interwoven" with federal law if the state has made application of the procedural bar that depends on an antecedent ruling on federal law, in this case, the determination of whether federal constitutional error has been committed. *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985).

In the instant case, the California Court of Appeal found that, because the Cupertino City Council's vote to uphold the building permit in question involved an exercise of discretion, traditional mandamus was unavailable to petitioners. *See* App. 21-27. While traditional mandamus is generally available only in situations involving governmental failure to discharge a non discretionary, ministerial duty, where the circumstances concern an erroneous interpretation of law by an inferior tribunal or governmental body, an action based in traditional mandamus is cognizable. *Associated Builders & Contractors, Inc. v. San Francisco Airports Commission,* 21 Cal.4th 352, 361 (1999).

Significantly for present purposes, traditional mandamus is available to review the misapplication of constitutional provisions. *Id.* at 380-381. Here, if petitioners are correct that issuance of the subject building permit violated their federal due process rights, that constitutional infringement would constitute an error of law which is correctable on traditional mandamus. *Id.*

Since errors of federal constitutional interpretation are cognizable in traditional mandamus, the only way the state court could determine that traditional mandamus was not available to petitioners was to concomitantly negate their federal due process rights. In accord, the state law grounds upon which the state court judgment was based was necessarily entwined with a determination of federal constitutional due process rights, and therefore, as the state court's judgment was interwoven with the federal grounds, federal jurisdiction must attach.

Stated differently: were this Court to rule differently on the issue of the availability of traditional mandamus to petitioners to allow them to challenge the denial of their federal due process rights, that determination would in itself negate the California Court of Appeal's decision. Hence, it cannot be said that the state court's federal due process determination has no impact on the state court's judgment on petitioners' traditional mandamus claim,[1] and thus,

[1] The California Court of Appeal implicitly acknowledged as much by discussing petitioners' due process arguments separately from its treatment of traditional mandamus. *See* App. 27-29 and App. 21-27. Had the mandamus analysis been sufficient to dispose of petitioners' due process arguments by itself, there would have been no reason for the court below to reach the constitutional question in a subsequent portion of its opinion.

At most, the state court's lack of establishing the foregoing connection merely renders the state court decision unclear on its face as to the extent to which the state court judgment relies on federal constitutional concerns versus state law grounds. And where, as here, the state court judgment lacks a plain statement

(Continued on following page)

this Court has jurisdiction to review the state court judgment. *Long*, 463 U.S. at 1040-1042; *Florida v. Powell*, 130 S.Ct. at 1211.

Furthermore, the state court's mandamus ruling is based upon the exact same conclusion of law which undergirds its due process analysis. The court below concluded that traditional mandamus principles did not apply to petitioners' claims on the ground that the building permit in question authorized only "a minor change, . . . a change that did not affect neighboring property owners' reasonable expectations, *i.e.*, substantial interests." App. 26.[2] At the same time, the state court rejected petitioners' due process claim based upon its view that the harm suffered was not sufficiently "severe . . . significant or substantial" to trigger a due process right to advance notice of their neighbor's building permit application. App. 28.

Thus, it appears that precisely the same legal judgment which underlay the state court's due process determination – that petitioners' property

---

of whether the judgment is based on federal or state grounds, this Court has adopted the position that the state court decided the case the way it did because it believed that federal law required it to do so, and thus, federal jurisdiction attaches. *Hawaii v. Office of Hawaiian Affairs*, ___ U.S. ___, 129 S.Ct. 1436, 1442 (2009); *Harris v. Reed*, 489 U.S. 255, 261 (1989).

[2] In a footnote, the California Court of Appeal elaborated upon what it meant by "substantial interests," stating that "we interpret that term to mean interests substantial enough to upset neighboring property owners' reasonable expectations regarding the quiet enjoyment of their property." App. 26 fn. 5.

and privacy rights were not impacted in a "substantial" way by issuance of the building permit – also formed the basis of its assessment that the City had discretion not to provide notice under state law. *Cf.* App. 26 and 28. Because the state court rejected the application of traditional mandamus principles on the same ground that it dismissed petitioners' due process claims, the federal and state issues are interwoven and thus interdependent, rather than independent of one another. As such, the state law determination was not an independent basis for the state court decision, and federal jurisdiction is appropriate, allowing this court to review this case. *Long*, 463 U.S. at 1040-1042; *Powell*, 130 S.Ct. at 1211.

B. The State Court Judgment Regarding Petitioners' Administrative Mandamus Claim Was Not Based On Independent State Law Grounds

In the instant case, the California Sixth District Court of Appeal affirmed the California Superior Court's dismissal of appellants' administrative mandamus claim on the ground that it was precluded due to petitioners' failure to exhaust their administrative remedies under the Cupertino Municipal Code. App. 18-21.

One need not exhaust administrative remedies, however, where, as in the instant case, the procedures

followed are constitutionally inadequate.[3] *Horn v. County of Ventura*, 24 Cal.3d 605, 611 (1979); *Glendale City Employees' Association, Inc. v. City of Glendale*, 15 Cal.3d 328, 342-343 (1975).[4] Thus, if access to administrative mandamus is not restricted due to the failure to exhaust administrative remedies, *Horn*, 24 Cal.3d at 611, where, as in the instant case, constitutionally inadequate procedures were followed, the only way the California appellate court could reach the conclusion that petitioners were precluded from bringing their administrative mandamus claim due to their failure to exhaust their administrative remedies was to concomitantly determine that the lack of notice with respect to the construction and permit issuance for the window construction was a *de minimis* violation of the federal constitution. Thus, the proffered state law ground is not independent of petitioners' federal due process rights, but rather, is

[3] "Due process principles require reasonable notice and opportunity to be heard ***before*** governmental deprivation of a significant property interest," *Horn*, 24 Cal.3d at 612 (emphasis added) (citing *North Georgia Finishing, Inc. v. Di Chem, Inc.*, 419 U.S. 601, 605-606 (1975); *Goss v. Lopez*, 419 U.S. 565, 572-576 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 576-577 (1972), *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971), *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969).

[4] *Accord, Environmental Law Fund, Inc. v. Town of Corte Madera*, 49 Cal.App.3d 105, 114 (1975) ("the failure of a private person to exhaust an administrative remedy, against governmental action taken in an administrative proceeding to which he was not a party, does not bar him from seeking judicial relief from such action by way of enforcing rights which he holds as a member of the affected public").

inextricably bound up with them, and in accord, the Court has jurisdiction. *Hawaii v. Office of Hawaiian Affairs*, ___ U.S. ___, 129 S.Ct. 1436, 1442 (2009); *Harris v. Reed*, 489 U.S. 255, 261 (1989).

C. The State Court Judgment Regarding Petitioners' Administrative Mandamus Claim Was Not Based On Adequate State Law Grounds

To be considered "adequate," a putative state ground must be strictly or regularly followed and consistently applied. *Beard v. Kindler*, ___ U.S. ___, 130 S.Ct. 612, 618, (2009); *Hathorn v. Lovorn*, 457 U.S. 255, 262-263 (1982); *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964). Here, petitioners' administrative mandamus claim was denied for procedural reasons – specifically, on the rationale that petitioners had failed to seek reconsideration from the Cupertino City Council after having already been turned down on a 5-0 vote. *See* App. 18-21.

Under well-established California law, however, where an administrative tribunal has already spoken on a given subject, an aggrieved party is not obligated to seek further consideration from that body for purposes of exhausting its administrative remedies. Rather, the "futility" exception to the exhaustion requirement excuses the aggrieved party from continuing to bang his or her head against a proverbial brick wall. *See, e.g., Vernon Fire Fighters v. City of Vernon*,

107 Cal.App.3d 802, 828 (1980).[5] Notwithstanding, the California Court of Appeal nonetheless ruled that petitioners' failure to request reconsideration from the Cupertino City Council barred their administrative mandamus claim – completely disregarding *Vernon Fire Fighters* and *Doster v. County of San Diego*, 203 Cal.App.3d 257 (1988) – neither of which it bothered to cite, much less distinguish. *See* App. 18-21.

As noted above, however, a state-imposed procedural barrier will not be considered "adequate" and result in the foreclosure of review of a federal constitutional issue where such state procedure is not consistently applied. *See Hathorn*, 457 U.S. at 262-263; *Ford v. Georgia*, 498 U.S. 411, 424 (1991). In the instant case, petitioners' situation vis-à-vis the Cupertino City Council was indistinguishable from that of the aggrieved parties in *Doster* and *Vernon*.[6] Because the

---

[5] *Accord, Jonathan Neil & Assoc., Inc. v. Jones*, 33 Cal.4th 917, 936 (2004); *County of San Diego v. State of California*, 15 Cal.4th 68, 89 (1997).

[6] The plaintiff in *Doster* had previously sought and obtained a ruling from the relevant governmental body with respect to the substance of his grievance. There, as here, all of the relevant issues already "had been presented and decided earlier." *Doster*, 203 Cal.App.3d at 262. Faced with an argument that a party had failed to exhaust his administrative remedies by failing to ask the same governmental body to review the same evidence and issues a second time, the *Doster* court ruled that the circumstances plainly fell within the principle that "[t]he law does not require a party to participate in futile acts." *Id.*

(Continued on following page)

court below did not apply these principles in a manner consistent with preexisting law, its exhaustion of administrative remedies ruling does not represent an adequate state law basis for refusing to consider petitioners' federal due process claim on its merits. *See Hathorn*, 457 U.S. at 262-263; *Ford*, 498 U.S. at 424; *Wright v. Georgia*, 373 U.S. 284, 289-291 (1963).

II. Certiorari Should Be Granted To Resolve A Conflict Between Multiple Decisions Of This Court And The California State Courts Concerning The Minimum Property Deprivation Required To Implicate The Fourteenth Amendment's Right To Due Process

Respondent further contends that the state court properly found that the property and privacy impact of a neighbor's bathroom window looking directly into their townhouse living room was *de minimis* for purposes of the Due Process Clause. The City makes this argument, however, not by defending the state court's analysis of the due process issue, but by twisting the facts to make it appear that petitioners' claims would fail under any legal standard.

In *Vernon*, a city council had promulgated a rule concerning firefighter safety, and previously "manifested its belief that its adoption of the rule was a management prerogative." *Vernon*, 107 Cal.App.3d at 828. The firefighters union failed to exhaust its administrative remedies before seeking judicial relief, but the court ruled that in light of the city council's prior unambiguous statements on this subject, such efforts at exhaustion would have been futile. *Id.*

To respond to this argument, a bit of background is necessary: the trial court made no findings, one way or the other, regarding the impact of the bathroom window addition on petitioners' property or privacy rights. *See* App. 34-35. Apparently to fill this void, the California Court of Appeal made its own factual "findings" – based upon arguments, not evidence, presented to the Cupertino City Council – to the effect that the bathroom window addition's impact was tiny, given that someone on an outdoor balcony at the end of the neighbor's building also could see into other portions of petitioners' townhouse living room if they made a concerted effort to stand in the right position. App. at 28-29 and fn. 6.

Petitioners objected (and continue to object) to this *ad hoc* appellate fact-finding, but even assuming *arguendo* that the state appellate court's determination is accurate,[1] it would not support respondent's statement that the window addition "created no greater an intrusion into [petitioners'] privacy than the view provided from the same neighbor's existing

[1] Respondent urges this Court to defer to these appellate "findings", however, the two authorities it cites on this subject require deference only to ***trial court*** factual findings – on issues such as credibility and intent – and do not speak to a legal factual determination of the sort at issue here which is made in the first instance by an appellate court. *See Hernandez v. New York*, 500 U.S. 352, 368-369 (1991); *Miller v. Fenton*, 474 U.S. 101, 114 (1995).

balcony." ROB at 11.[5] Even the California Court of Appeal acknowledged that the two views into (and conversely, from) petitioners' living-room were different: one was straight-on, and the other from a sideways angle. App. 28-29 fn. 6.

Petitioners submit that only by distorting the privacy impact of the bathroom window can the state court's decision upholding the City's failure to provide advance notice of the building permit to petitioners be squared with the due process clause of the Fourteenth Amendment. Under this Court's precedents, petitioners were deprived of property and privacy rights by the City's action by far more than a *de minimis* extent. Review of this case is warranted, therefore, to bring California's jurisprudence on this subject back in line with numerous contrary precedents of this Court.

This Reply is neither the time nor place to argue the merits of whether the notice and hearing requirements under the Fourteenth Amendment of the federal Constitution required the state appellate court to reverse the California superior court's denial of petitioners' right to pursue a writ of mandate against the City. It is, however, the time and place to

[5] Respondent City mischaracterizes the "evidence" in the record, as well as the conclusions of the state court, by further proclaiming that "the City's decision did nothing to reduce the Critzers' privacy" and that the window did "nothing to change the status quo regarding the views of the Critzers' property from the neighbor's house." ROB at 12.

note that this issue is not one about which the state court should be the final arbiter. Rather, that province belongs to this Court, and to this Court alone. *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 611-612 (1989); *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

CONCLUSION

For all of the foregoing reasons and those articulated in petitioners' opening Petition, given the importance of federal due process considerations as they impact property owners, petitioners urge this Court to grant review of this matter.

Respectfully submitted,

A.K. Abraham
Counsel of Record for Petitioners
Chauvel, Abraham & Descalso, LLP
155 Bovet Road, Suite 780
San Mateo, California 94402-3155
(650) 573-9500
aka@chauvelabraham.com